BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF ARLEN C. STEBBINS dba A-1 AUTOMOTIVE & MUFFLER, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 85-185 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS MATTER, the appeal of a $2,000 civil penalty for removing catalytic converters allegedly in violation of respondent's WAC 18-24-040, came on for hearing before the Pollution Control Hearings Board, Lawrence J. Faulk, Chairman, Gayle Rothrock, Vice Chairman, and Wick Dufford, Lawyer Member convened at Lacey, Washington on January 14 and February 13, 1986. Administrative Appeals Judge William A. Harrison presided.

Appellant appeared by his attorney, Thomas H. Murphy. Respondent appeared by Tereses Neu Richmond, Assistant Attorney General.

Reporter Betty Koharski recorded the roceedings.

Witnesses were sworn and testified. Exhibits were examined. A schedule of closing argument was set to conclude on March 6, 1986, and was extended until March 17, 1986. From testimony heard and exhibits examined, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I

Emission control systems, known as catalytic converters, are installed in modern motor vehicles by all manufacturers, under federal law, for the purpose of suppressing the emission of carbon monoxide into the air.

II

In 1984, the Washington State Department of Ecology (DOE) adopted a program, with federal funding, to identify automotive repair shops which would tamper with or remove catalytic converters from automobiles.

III

As the first step of this program, an investigative unit was formed within the DOE. The unit operates undercover. That is, the members of the unit pose as ordinary citizens bringing their car to a shop for repair.

IV

Acting upon the allegation that catalytic converters were being removed from cars at A-1 Automotive & Muffler (A-1) of Kent, Washington, an investigation of that business was commenced by the DOE

investigative unit.

V

On January 18, 1985, the DOE investigator arrived at A-1 and was met by a mechanic who later identified himself as Wayne Mason. The investigator stated to Mr. Mason that her car was purchased second-hand, and had developed a strong rotten egg odor. This statement was pre-selected to focus attention on either an untuned engine or the catalytic converter, either of which could cause such an odor. The mechanic, Mr. Mason, put the car, a 1984 Ford Tempo, 23,696 miles, on the lift. At this point a man who later identified himself as Arlen Stebbins came forth. He identified himself as owner on the day in question. Stebbins made no exhaust test but at once declared that the catalytic converter was the problem. He suggested that a straight pipe (known as a "test tube") be installed in place of the converter. Stebbins declared that test pipes were made right there in the shop, that he had "made a hundred of them," that it was illegal to remove the catalytic converter, but that the car would run smoother, get better mileage and could use unleaded gasoline. Stebbins nodded to Mason who removed the catalytic converter and replaced it with a test tube. No further arrangements were made except that Stebbins presented a bill for $35 plus tax to the investigator who paid the bill in cash. She then left the shop in the subject car with no catalytic converter in place.

VI

On January 24, 1985, six days after the first incident, the same

DOE investigator returned to A-I in the company of another DOE investigator posing as a friend with a similar "rotten egg odor problem" from his 1985 Pontiac Firebird. The same mechnic, Mr. Mason, was on duty at A-I. He was on the premises with the knowledge and consent of Mr. Stebbins who placed Mason there to operate the business, even though Mr. Stebbins was absent from the premises at that moment. In keeping with the trend set by the earlier incident, Mr. Mason made no test of the catalytic converter, diagnosed it to be faulty and suggested its removal. Thereafter he removed the catalytic converter and replaced it with a test tube. He presented a bill for $35 plus tax. The investigators paid, and left the shop in the subject car with no catalytic converter in place.

VII

On March 12, 1985, the DOE investigator returned a third time to A-I where she again found Mr. Stebbins and Mr. Mason. On that date she observed a stack of catalytic converters at the rear of the A-I premises, and the photograph admitted as R-8 depicts these as observed on that date.

VIII

The Department of Ecology regulation at issue provides:

> WAC 18-24-040 STANDARDS OF MOTOR VEHICLES. No person shall remove or render inoperable any devices or components of any systems on a motor vehicle installed as a requirement of federal law or regulation for the purpose of controlling air contaminant emissions, subject to the following conditions:

(1) The components or parts of emission control systems on motor vehicles may be disassembled or reassembled for the purpose of repair and maintenance in proper working order.

(2) Components and parts of emission control systems may be removed and replaced with like components and parts intended by the manufacturer for such replacement.

(3) The provisions of this section (WAC 18-24-040) shall not apply to salvage operations on wrecked motor vehicles when the engine is so damaged that it will not be used again for the purpose of powering a motor vehicle on a highway.

IX

The pertinent penalty provision in this matter provides, at RCW 70.94.31:

(1) In addition to or as an alternate to any other penalty provided by law, any person who violates any of the provisions of chapter 70.94 RCW or any of the rules and regulations of the department or the board shall incur a penalty in the form of a fine in an amount not to exceed one thousand dollars per day for each violation. Each such violation shall be a separate and distinct offense, and in case of a countinuing violation, each day's continuance shall be a separate and distinct violation. For the purposes of this subsection, the maximum daily fine imposed by a local board for violations of standards by a specific emissions unit is one thousand dollars.

(2) Further, the person is subject to a fine of up to five thousand dollars to be levied by the director of the department of ecology if requested by the board of a local authority or if the director determines that the penalty is needed for effective enforcement of this chapter. A local board shall not make such a request until notice of violation and compliance order procedures have been exhausted, if such procedures are applicable. For the purposes of this subsection, the maximum daily fine imposed by the department of ecology for violations of standards by a specific emissions unit is five thousand dollars.

(3) Each act of commission or omission which procures, aids or abets in the violation shall be considered a violation under the provisions of this section and subject to the same penalty. . . .

X

On August 22, 1985, DOE assessed a civil penlty of $2,000 against Arlen C. Stebbins dba A-I Automotive and Muffler for alleged violation of WAC 18-24-040 relating to catalytic converters. The penalty was assessed under RCW 70.94.431(1) of the Clean Air Act. Arlen C. Stebbins appealed the penalty to this Board on September 19, 1985.

XI

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact the Board comes to these

CONCLUSIONS OF LAW

I

This case involves four issues which we will address in turn: 1) whether violations occurred, 2) whether the person against whom the penalty was assessed committed those violations 3) whether the defense of entrapment has been established and 4) whether the amount of penalty is reasonable.

II

Violations. The Department of Ecology rule at issue, WAC 18-24-040 (text at Finding of Fact VIII, above) has been uphald against a challenge to its validity in Frame Factory v. Ecology, 21 Wn.App. 50, 583 P.2d 660 (1978). The court found the rule to be

reasonably consistent with the purpose of the Clean Air Act, 70.94 RCW. Id. p. 54. Moreover, the court emphasized that the Act's purpose is to provide air pollution prevention and control Id. p.53. We are mindful of that purpose as we interpret the meaning of the rule's terms. We hold, first, that these catalytic converters are the type of device addressed in the rule. Secondly, that the rule's admonition that "No person shall remove. . ." applies not only to car owners but to all persons, including operators of auto repair shops. Thirdly, when a person removes a converter, that person violates WAC 18-24-040 where, as here, the vehicle goes back into operation before like components are installed. Nothing in the enumerated subsections of the rule authorizes operation of the vehicle without a converter. Moreover, this is the only interpretation of the rule which is consistent with the Act's purpose of air pollution control. We conclude that a violation of WAC 18-24-040 occurred on each of the two separate occasions involving the two separate cars in this matter.

III

Penalty Assessed Against Violator. This penalty is assessed against Mr. Stebbins in his individual capacity; that is, as one responsible for his own actions or for the actions of others who serve him as sole proprietor of A-I Automotive. Mr. Stebbins, in turn, urges that the proprietor of A-I is not himself individually but rather a corporation of which he is the sole shareholder and chief officer. The evidence before us on whether A-I is a sole proprietorship or a corporation is inconclusive. We think it is also

immaterial on the facts of this case. It is undisputed that the converters were removed by Mr. Mason. However it is equally clear that by his presence during the first instance (January 18, 1985) Mr. Stebbins failed to prohibit the removal of the converter and, moreover, joined in the knowing approval of that action by suggesting it to the investigator and billing her for it. This established a shop policy which Mason felt justified in carrying out during the second incident (January 24, 1985) because Mr. Stebbins is the boss, be he proprietor or corporate officer. We therefore conclude that by these acts of commission and omission Mr. Stebbins procured, aided and abetted the violations of Mr. Mason, and therefore committed violations in his own right as an individual on both days in question. RCW 70.94.431(3). The penalty is properly assessed against Mr. Stebbins in his individual capacity.

IV

Entrapment. The practice of undercover investigation requires scrutiny to assure that it does not malfunction in ways that have been identified in the criminal law system where undercover investigation originated. Therefore, in cases before us involving civil undercover investigation, we will allow an appellant to raise the affirmative defense of entrapment. We will turn for guidance to the established cases in the criminal law in applying that doctrine in our civil cases.

In State v. Smith, 101 Wn2d 36, 677 P.2d 100 (1984) the elements of entrapment were set out: (1) the defendant must demonstrate that he was tricked or induced into committing the crime by acts of

trickery by law enforcement agents and (2) he must demonstrate that he would not otherwise have committed the crime. In our cases, the burden of proving these two elements is upon the appellant. See State v. Ziegler, 19 Wn.App. 119, 575 P.2d 723 (1978).

In this case, appellant has not proven the first of these elements. The statements of the Department of Ecology investigators were pre-selected, as we have found, to focus attention upon the catalytic converter. However, the sum of these and other statements did not exceed the "normal amount of persuasion" which under Smith, supra, does not constitute entrapment. When presented with an opportunity to violate WAC 18-24-040 appellant readily did so. We conclude that appellant was not entrapped in this matter, and is not thereby exculpated from these violations.

V

Amount of Penalty. The penalty imposed by Department of Ecology under RCW 70.94.431(1) in this case is the maximum under that section for each of the two violations. However, the $1,000 for each violation, total $2,000 is considerably less than the maximum penalty. That is due to RCW 70.94.431(2) which, in proper circumstances, would allow $5,000 per incident, total $10,000.

As to the $2,000 civil penalty assessed by Department of Ecology, we note the following. First, appellant informed the investigator that he knew it was illegal to remove a catalytic converter. Second, appellant operated a commercial enterprise, and charged a fee for removing the converters. Third, appellant caused these converters to

be removed without any objective test of them. Fourth, appellant exhibited little concern for the fact that emissions from the two cars would be uncontrolled, indefinitely, due to his actions. Lastly, appellant prepared test tubes on his premises, and informed the investigator that he had "made a hundred of them" which supports a conclusion that converters had been removed previously by appellant under circumstances similar to the two incidents in this case. This conclusion is coroborated by the pile of used converters stored on the premises.

We apply a three-part test in evaluating the reasonableness of an assessed penalty: The factors are: (1) the severity of the violation, (2) the violator's prior record, and (3) the violators behavior since the violation occurred. Puget Chemco v. PSAPCA, PCHB No. 84-245 (1985). In this case, little evidence was offered under the second and third elements of our test. The factors which we enumerate above, however, establish that the severity of this violation was substantial. The $2,000 civil penalty was justified and reasonable.

VI

Any Finding of Fact which deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law the Board enters this

ORDER

The violations and $2,000 civil penalty are affirmed.

DONE at Lacey, Washington this 23rd day of April, 1986.

POLLUTION CONTROL HEARINGS BOARD

4/23/86

LAWRENCE J. FAULK, Chairman

GAYLE ROTHROCK, Vice-Chairman

WICK DUFFORD, Lawyer Member

WILLIAM A. HARRISON
Administrative Appeals Judge